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June 5, 1995

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Santa Monica Community College District
Application for New Noncommercial FM Station
Mojave, California
File No. BPED-920305ME
MM Docket No. 94-71

Dear Mr. Caton:

On behalf of California State University, Long Beach Foundation, there are transmitted herewith an original and six (6) copies of its "Opposition to Motion to Strike" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Patricia A. Mahoney
Counsel for California State University,
Long Beach Foundation

PAM:dwi
Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of	)	MM Doc. No. 94-71
	)	
SANTA MONICA COMMUNITY COLLEGE DISTRICT	)	File No. BPED-920305ME
	)	
For a Construction Permit for a New Noncommercial FM Station at Mojave, California	)	

To: The Honorable Joseph Stirmer
Chief Administrative Law Judge

OPPOSITION TO
MOTION TO STRIKE

California State University, Long Beach Foundation (CSU), licensee of noncommercial educational station KLON(FM), Long Beach, California, by its attorney, hereby respectfully opposes the Motion to Strike its "Comments on a Motion To Grant Pending Application" ("Comments"), filed on May 24, 1995, by Santa Monica Community College District ("SMCCD") in the above-captioned proceeding:

Although CSU was not permitted to intervene as a party to this proceeding and was not served with SMCCD's Motion to Grant Pending Application ("Motion to Grant"), CSU has a pending application that the Mass Media Bureau has repeatedly acknowledged in this proceeding is mutually exclusive with the above-captioned application of SMCCD. CSU's interests would clearly be adversely affected by grant of the Motion to Grant; and the Presiding Judge should therefore consider CSU's

Comments, notwithstanding his earlier ruling denying CSU leave to intervene in this proceeding.

The Presiding Judge has full authority to consider CSU's Comments, filed May 12, 1995, in this proceeding, notwithstanding the fact that CSU is not a party to this proceeding. Moreover, the authorities referenced by CSU and the facts relied upon by CSU in its Comments are a matter of public record at the Commission, of which official notice can be taken.[1] All CSU has done is draw the Presiding Judge's attention to facts and authorities already available to the Presiding Judge, including published decisions. Thus the fact that CSU is not a party to this proceeding is no impediment to the Presiding Judge's consideration of CSU's Comments and would not be prejudicial or unfair to SMCCD.

SMCCD's Motion to Strike is in reality an unauthorized reply to CSU's Comments and should itself be stricken. If it is not stricken, the Presiding Judge should consider the following comments.

SMCCD faults CSU for not untimely appealing the Judge's acceptance of SMCCD's amendment, because SMCCD says that, if CSU had appealed, "SMCCD could have withdrawn its amendment." Yet, before the Judge even acted on SMCCD's amendment, SMCCD had actual notice of a competing application that was mutually exclusive with SMCCD's amendment. SMCCD had time to prepare and file an informal

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[1] The Commission may take official notice of its own records, including applications and filings before it, as well as its own public notices and decisions. See Midwest Television, Inc. v. FCC, 426 F.2d 1222 (D.C. Cir. 1970).

objection against CSU's mutually exclusive application, but SMCCD did not bother to advise the Judge of CSU's mutually exclusive application or ask that he withhold action on the requests to approve the settlement agreement and accept its amendment. SMCCD obviously gambled that the Judge would act and that his action would become final before CSU would become aware of and be able to react to SMCCD's amendment.

SMCCD states that the Commission has yet to make a finding that CSU is legally qualified for the facilities it requested. CSU is not a new applicant. CSU is an existing licensee, and there is no question that it possesses the requisite legal qualifications. CSU's application is a minor modification application to modify KLON(FM)'s licensed and operating facilities. The application has already been accepted for filing. The Commission does not need to make a finding that CSU is legally qualified. There was no impediment or obstacle to acceptance of CSU's application, and SMCCD has not demonstrated that any such obstacle or impediment exists.

SMCCD has totally misread and misinterpreted Christian Broadcasting Association, Inc., 22 F.C.C. 2d 410 (1970), and Cabool Broadcasting Corp., 56 F.C.C. 2d 573 (Rev. Bd. 1975). One very obvious fact distinguishes the results reached in Christian and Cabool from the facts in the instant case. In Christian and Cabool, no application was on file on the channel to which the settling applicant was moving. Here, there is an application on file. CSU in good faith tendered its minor modification application for a power increase for its existing operation on Channel 201 only **eight days after SMCCD tendered its amendment to move to Channel 201,** contrary to

SMCCD's characterization of CSU's application as an "eleventh hour effort" that "comes too late." SMCCD's characterization of CSU's application as an "eleventh hour effort" is obviously nonsense.

More importantly, the Commission's decision in Christian rested on a determination that Section 1.605(c) supported retention of the application in hearing status, because in Christian there were unresolved issues remaining against the applicant that was changing channels. Section 1.605(c) of the Rules (now 73.3605(c)) only provided for removal of the application from hearing status where it is "amended so as to eliminate the need for hearing or further hearing on the issues specified." Thus, the result reached in Christian was clearly correct and does not support SMCCD.

Not discussed or even mentioned at all in SMCCD's Motion, which devotes substantial attention to the Commission's decision in Christian, is a Commission decision, discussed in Cabool, that was issued subsequent to the Commission's decision in Christian and distinguished the Christian decision. In TV Table of Assignments (Los Angeles, Calif.), 31 F.C.C. 2d 666 (1971), the Commission allotted a new reserved noncommercial educational television channel, UHF Channel *68, at Los Angeles at the request of one of two competing applicants in a hearing for Channel *58, Los Angeles. The Commission noted that a public interest consideration for the allotment was that it could open up a way for a more expeditious disposition of the comparative hearing in progress for Channel *58. 31 F.C.C. 2d at 667. However, the Commission refused to agree to the petitioner's request that if it amended to Channel *68 it be given hearing status protection on Channel *68 in order to insure that it would

not face further delays in processing. The Commission stated:

> "Affording such protection to VSTV would foreclose other interested parties from applying for the new assignment, and we think the public interest is best served **by following our usual practice** of giving interested parties an opportunity to apply for a new channel."

Id. at 668 (emphasis added). The Commission noted further, in response to the petitioner's reliance on the Christian decision, discussed supra, that:

> "It is noted that VSTV cites the Christian Broadcasting Association, Inc., case, 22 FCC 2d 410 (Memorandum Opinion and Order, adopted April 15, 1970, FCC 70-392, Docket No. 18439, BPH-6437) as precedent for its request. However, in that case, where an application was retained in hearing status for a newly assigned FM channel, an important consideration was that this action was taken several months after the FM assignment was made, during which time other interested persons had had an opportunity to file for the channel and none had done so. The usual practice in television (where the new assignment represents an additional channel rather than simply a substitution of one for another) is to make the new channel open for all applicants. See, for example, Dallas and Tyler, Texas and Lawton, Oklahoma (Docket No. 16763), 6 FCC 2d 657, FC 66-1155 (December 1966)."

Id. n. 3. In both the Los Angeles assignment proceeding and the Dallas and Tyler proceeding cited therein, the ordering clause of the Commission's decision permitted either applicant in hearing to apply for the vacant allotment but also ordered that if either applicant moved to the new channel it would "surrender hearing status protection."

The Review Board in Cabool examined both the Christian case and the Los Angeles TV Table of Assignments case. The Board agreed with the Broadcast Bureau that Section 1.305(c) was applicable. After examining several factors, however, the Board waived the rule. As CSU has demonstrated, SMCCD has not requested a

waiver, and clearly no waiver is warranted. Unlike the facts in Cabool and Christian, there is in the instant case a contemporaneous expression of interest in the channel to which SMCCD has amended. As noted supra, CSU's minor change application was filed only eight days after SMCCD filed its amendment to change channel to 201. CSU's application was filed in good faith, without any knowledge that SMCCD had tendered eight days earlier an amendment to change channels to 201. The Presiding Judge cannot waive Section 73.3605(c) and retain SMCCD's application in hearing status, as the Board did in Cabool, because there is an application on file that is mutually exclusive with SMCCD's. Indeed, SMCCD has not pointed to any authority that permits the Judge to grant SMCCD's application while there is a mutually exclusive application pending.

One more curious feature of SMCCD's Motion deserves comment. SMCCD notes that channel 204 has been available for years without an expression of interest. That may be true, but it is obviously irrelevant,[2] since SMCCD is now specifying operation on Channel 201 and CSU filed to increase power on Channel 201, the channel on which it already operates,[3] only eight days after SMCCD filed its amendment to move to Channel 201.

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[2] CSU's minor modification application on Channel 201 was not mutually exclusive with SMCCD's original application for Channel 204.

[3] CSU has a ten-year history of trying to improve its facilities on Channel 201 to provide service to the areas and populations proposed to be served in its minor modification application. See, e.g., MM Dockets 85-230 and 87-140; see also BPED-880115MJ.

The Presiding Judge should consider these comments and CSU's May 12 comments in ruling on SMCCD's Motion to Grant Pending Application and Motion to Strike.

For the foregoing reasons, California State University, Long Beach Foundation, respectfully requests that the Presiding Judge deny SMCCD's Motion to Strike.

Respectfully submitted,

CALIFORNIA STATE UNIVERSITY,
LONG BEACH FOUNDATION

By: Patricia A. Mahoney
Patricia A. Mahoney

Its Attorney

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June 5, 1995

CERTIFICATE OF SERVICE

I, Deborah W. Ingraham, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Opposition to Motion to Strike" were sent this 5th day of June, 1995, by first-class United States mail, postage prepaid, to the following:

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Deborah W. Ingraham